

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL
76-7284-7297

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

NAVIEROS OCEANIKOS, S. A., owner of the Liberian
Vessel TRADE DARING,

Plaintiff-Appellant-Appellee,

against

S. T. MOBIL TRADER, her engines, boilers, etc., MOBIL
OIL CORPORATION, the owner of the MOBIL TRADER,
and MOBIL SALES & SUPPLY CORPORATION,

Defendants and Third-Party

Plaintiffs-Appellees-Appellants,

against

TRADE & TRANSPORT, INC.,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF OF DEFENDANTS AND THIRD-PARTY
PLAINTIFFS-APPELLEES-APPELLANTS**

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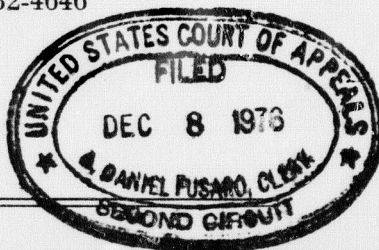


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BRIEF OF DEFENDANTS AND THIRD-PARTY PLAINTIFFS-APPELLEES-APPELLANTS

Issues Presented

1. Did the District Court err in denying indemnification to Mobil and Mobil Sales.
2. Did the District Court err in concluding that 26 $\frac{2}{3}$ tons of bunkers pumped aboard the DARING after 0042 hours would have filled the overflow double bottom tanks. Did it err when it concluded that the side tanks had overflowed. "
3. Did the District Court err in concluding that the DARING's fuel oil overflow and save oil systems conformed to vessel classification society rules and marine engineering safety requirements.
4. Would a violation of vessel classification society rules and marine engineering safety requirements by the DARING's fuel oil overflow and save oil systems constitute a proximate intervening cause, not reasonably foreseeable, between any alleged negligence of defendants and the casualty.
5. Did the District Court err when it concluded it was chronologically impossible to complete the bunkering by 0042 hours.
6. Did the Court err in holding both parties contributorily negligent, and apportioning liability at 75% Oceanikos and 25% Mobil, Mobil Sales & TRADER.

Statement of the Case

This is a cross-appeal from a decision of the District Court, Southern District of New York (Werker, J.), 409 F.Supp. 884 (1976), fixing the relative liability of parties at 75% for plaintiff, 25% for defendants, and dismissing the third-party complaint (11a).

The action was brought by Navieros Oceanikos, S.A. (Oceanikos) as owner of the Liberian tankship M/V TRADE DARING (DARING) against the S.T. MOBIL TRADER (TRADER), her owner, Mobil Oil Corporation (Mobil) and Mobil Sales & Supply Corporation (Mobil Sales), to recover damages sustained as a result of a fire which started in the engine room of the DARING in the early morning of March 18, 1971.

Mobil and Mobil Sales thereafter brought a third-party action against Trade & Transport Inc. (Transport) based on an indemnification provision of a marine fuel oil sales contract entered into on January 1, 1971 at the port of New York.

Plaintiff's motion for reargument and for additional findings, following the District Court's decision, was denied in all respects.

Statement of the Facts

(a) The Parties

The plaintiff, Oceanikos, a Panamanian corporation, owned the Liberian flag vessel DARING (6a).*

The defendant, Mobil, was the owner of the self propelled tank barge TRADER (6a).

The defendant Mobil Sales and the third-party defendant Transport were parties to a marine fuel oil sales contract

* "a" refers to the joint Appendix.

under which Mobil Sales agreed to sell and deliver bunkers to various vessels designated by Transport (6a). Transport acted as the agent for the DARING and Oceanikos when it ordered 375 tons of bunkers from Mobil Sales for the vessel (6a, 11a). Under the terms of the contract, Mobil Sales was the seller of fuel oil and Mobil was the supplier (7a).

(b) The M/V Trade Daring

The DARING, an oil/ore carrier, was built in 1955 in Germany under the construction standards of Germanischer Lloyd and the American Bureau of Shipping, the classification societies which established and administered those standards. She continued in service under German ownership until 1970, when she was sold to Oceanikos and thereafter was registered under the laws of Liberia. Following her purchase, the new owners discontinued classing the vessel with Germanischer Lloyd but retained the American Bureau of Shipping (6a).

The vessel was originally designed to utilize three grades of fuel oil, i.e. black oil for boiler service, diesel oil for main engine propulsion, and a gas oil or light oil for diesel generators. At some point in time before the casualty, the use of gas oil was discontinued and only a single grade diesel oil was used to operate the main engine and diesel generators (64a, 65a).

The fuel tanks, with the exception of two forward deep tanks, were all located in the engine room, aft (DARING Capacity Plan, Trial Exhibit 12). The total capacity of diesel and gas oil tanks in the engine room measured 571 long tons (Ex. Vol. 264).^{*} Diesel oil could be carried in three side tanks, two settling tanks, three day tanks, two overflow tanks and the two forward deep tanks (Schematic diagram of the DARING's save oil/vent system and fuel tanks, Ex. Vol. 268; 261, 262).

^{*} "Ex. Vol." refers to the Exhibit Volume of the Appendix.

The main fuel tanks were replenished by introducing fuel into the main intake valve at the bunkering manifold amidships on deck (Trial Exhibit 1, Ex. Vol. 1). It then travelled along the main filling line aft below decks, into the third platform of the upper engine room. At this point, another main valve together with the valves to the gas oil tank and the valves to the main port and starboard side tanks were located (Ex. Vol. 4, 101, Trial Exhibit 45, p. 66). When this inside main intake valve and, thereafter, the port and starboard side tank valves were opened, fuel oil would then flow into the port and starboard side tanks, i.e. the main holding tanks on the vessel. When the gas oil valve was opened, oil from this main line also filled the gas oil tank (Ex. Vol. 102).

Overfilling of these fuel tanks was prevented through use of overflow pipelines, fitted near the tops of these tanks. The overflow pipelines led to overflow tanks located in the vessel's double bottom (Ex. Vol. 174, 262, 268).

The vessel's original design called for a center double bottom overflow tank, with a capacity of 15.1 long tons, to accommodate overflows from the diesel oil tanks. A starboard double bottom overflow tank with a capacity of 8.1 long tons accommodated overflows from the gas oil tanks (57a, 58a, Ex. Vol. 264, 268). At the time of the casualty, the starboard and center overflow double bottom tanks were interconnected, having a capacity of 23.2 long tons (64a, 65a). An attentive watch stander could spot an overflow through sight glasses fitted into the overflow lines (Ex. Vol. 262). Thereafter, speedy and remedial action could be taken to block off further incoming oil by closing either the main intake valve on the main deck or on the third platform deck of the engine room (Ex. Vol. 263). Another alternative would be to re-route the oil to the forward deep tanks, which had a capacity of over 900 long tons, the largest fuel tanks on the vessel (Ex. Vol. 264, 267).

Overflows from these tanks could occur during bunkering or fuel oil transfer operations, either when the main side tanks were being replenished from sources without the vessel or when the smaller tanks were being refilled from the main side tanks within the vessel. These overflows could involve large volumes and for that reason overflow tanks of 15.1 long tons and 8.1 long tons were appropriately fitted to accommodate these spillages.

In addition, the vessel's original design also called for another overflow pipeline system to accommodate overflows of comparatively smaller amounts, in the form of drippings, issuing from various tanks and auxiliary machinery. These drippings collected in save oil catch basins which surrounded or fronted these tanks or machinery (Ex. Vol. 263). This system kept the engine room clean and free from oily residues and also collected every drop of fuel for future consumption.

As it was originally designed, the save oil system utilized:

- (a) open catch basins to collect drippings;
- (b) open drains in the basins;
- (c) pipelines from the drains;
- (d) hand closure valves in the pipelines beneath basins to drain or flush the basins;
- (e) a leak tank to collect the drippings;
- (f) a suction line from the leak tank to a hand pump to pump it dry;
- (h) a three valve manifold to inspect and re-route the collected drippings in the leak tank to other tanks for future consumption. (Fuel Oil Transfer Piping Blueprint, Trial Exhibit 54.)

This save oil system functioned in the following manner: Drippings which collected in open catch basins would be

periodically drained off by opening the hand valve in the pipeline beneath the basin (146a, 147a). These drippings drained into a leak tank having a capacity of only 600 liters (approximately 4 barrels) which was located below the floor plates and under the engine room main operating platform (82a, 83a, Trial Exhibit 15, 16). When it was filled, the leak tank would also be drained off by a suction line connected to its base which ran along the vessel's bottom and then up to a three way inspection manifold and hand pump located above the main operating platform (Trial Exhibit 54; 83a, 84a, 162a, 163a).

The drippings were inspected at this point and the engineer on watch could then decide which oil tank it could be re-routed to for future consumption (162a, 163a, Trial Exhibit 54).

The leak tank system was inefficient (166a) requiring constant attention on a daily basis to see that it did not overfill (167a).

As it was *originally designed*, the save oil system called for a *hand closure valve* beneath the catch basins to (a) the port and starboard diesel oil day tanks, (b) the port and starboard diesel oil settling tanks, (c) the port light oil day tanks and (d) *two hand closure valves* beneath the central oil filters (The Fuel Oil Transfer Piping Blueprint, Trial Exhibit 54).

Although the District Court did not so find, the evidence at trial was that the original save oil system had been substantially modified prior to the fire. In total disregard of original design, which was in accordance with classification society rules and safe engineering practices, the vessel's save oil pipeline system was so altered that these lines transmitted drippings, either directly or through connections made with vent pipelines, to the center or starboard overflow double bottom tanks (Ex. Vol. 263, 268, 156a, 197a). These overflow tanks having a combined capacity

of 23.2 long tons made completely unnecessary the small leak tank, having a capacity of only 4 barrels, to collect drippings.

Testimony elicited from the representative of the United States Coast Guard, who inspected the system shortly after the fire, the DARING's acting Second Engineer, and surveyors who examined the vessel following the fire, established that the hand operated valves in the save oil system had been removed. Since there were no valves, a free and uninterrupted flow of drippings found access directly into the overflow tanks through the save oil pipelines (Ex. Vol. 263, 156a, 197a). This also permitted ignitable gases and fuel to be transmitted back up through the same pipelines from the overflow double bottom tanks and vent out through the open catch basin of the central oil filters (Ex. Vol. 79, 80, 132, 133, 342, 345). This violated the 1953 Germanischer Lloyd Rules for Classification and Construction of Machinery of Seagoing Ships, the Rules under which the DARING was built.

"Chapter 9—Section 21

Storage of Fuel

* * *

2. *Installation of Fuel Tanks*

Fuel storage tanks and bunkers are to be so installed and equipped that they are not unduly heated by the engine and its piping as well as by the auxiliary boilers or heaters and that *fuel or inflammable gases cannot discharge* into the engine or boiler room." (Ex. Vol. 341) (Emphasis added)

It violated Chapter 7 Section 2 subsection 5 of the 1954 Germanischer Lloyd Rules (Ex. Vol. 343).

It also violated the 1954 American Bureau of Shipping Rules for Building and Classing Steel Vessels Section 36, "Pumps and Piping Systems" (Ex. Vol. 275); Section 34, "Internal Combustion Engines", subsection 19(b) (Ex. Vol. 276); the 1971 American Bureau of Shipping Rules,

Section 34 "34.35.2 Oil Tanks and Drains" (Ex. Vol. 279); and Section 36, "36.39.4 Ballast and Other Oil Tanks" (Ex. Vol. 278) (Ex. Vol. 336-348).

The system, as modified, was a hazard to the vessel, its personnel, and the property of others in that it permitted fuel oil and gases to be vented or discharged directly into the engine room. The system, as modified, was in contravention of all classification society rules and safe engineering practices, in that the classification rules specify that fuel oil and gases must be vented or discharged to an open deck.

(c) The Mobil Trader

The TRADER, a self-propelled steel tank barge, was built in 1967 and was employed in transporting and delivering bunkers to vessels calling in New York (6a).

Delivery of bunkers was accomplished through the use of two diesel engine driven pumps located on the main deck, one on the starboard side and one on the port side of the TRADER. The starboard engine was only capable of pumping cargo. The port engine, however, was capable of pumping cargo as well as energizing a hydraulic system which raised and lowered the boom supporting the cargo hose (Trial Exhibit 33 Photographs 1, 2 and 4, 313a, 354a). The pumps each delivered approximately 200 tons of oil per hour at maximum speed (8a). In cases where a receiving vessel closed its main intake valve and interrupted the flow of bunkers, a relief valve aboard the TRADER would open and the oil would be re-routed to the TRADER's tanks through a recirculating line (309a, Ex. Vol. 267, 4th par.).

**(d) Chronology of events leading to the
Fire aboard the M/V Trade Daring
on March 18, 1971**

Transport, on behalf of Oceanikos, ordered Mobil Sales to supply the DARING with 375 long tons of bonded diesel oil (11a).

Mobil Sales thereupon requested Mobil to deliver this order to DARING. Mobil dispatched its vessel, TRADER, to Port Mobil, the loading terminal, at 1300 hours, March 17, 1971 (7a). The vessel loaded *373.8 long tons* of diesel oil, which was *1.2 long tons less* than the 375 long tons ordered by Transport (11a). The TRADER left Port Mobil at 1900 hours and arrived at 1920 hours alongside the DARING, at the Hess Oil Terminal (7a).

Regulations in effect at the Hess Oil Terminal prohibited the TRADER from bunkering the DARING because it was still engaged in cargo discharge operations (7a).

At about 2220 hours fuel oil hoses were taken on board by the DARING's crew who made the connection at the main intake valve of the bunkering manifold (7a, 355a). Because the DARING had just discharged all of her cargo, her main deck was high above the main deck of the TRADER. The TRADER therefore had to connect its four inch, 12 foot long hose to its six inch, 30 foot long hose in order to reach the DARING's bunkering manifold (354a, 355a). The four inch hose was connected to the flange of the main intake valve on the DARING (Trial Ex. 1, Ex. Vol. 1).

At approximately 2250 hours, the TRADER, using its starboard diesel engine pump, commenced bunkering the DARING. Pumping proceeded slowly at first, to make sure that all connections were tight and that no back pressure existed (8a). Within five minutes pumping was increased to maximum speed (T.M. 399, 400).*

* "T.M." refers to trial minutes.

Pumping proceeded without incident to a point, where a divergence in testimony between the crews of the DARING and of the TRADER makes necessary the following dichotomy in this statement of facts.

- (i) **The version given by the Daring's unlicensed acting engine room officers, Theodoros P. Bafaloukos and Andreas Spetsiotis, who were on duty at the time the fire commenced.**

The acting Third Engineer, Theodoros P. Bafaloukos, went on watch at midnight to stand his 12-4 watch (Ex. Vol. 63). He received advices from the Chief Engineer that the vessel was ballasting and taking on bunkers (Trial Exhibit 45, p. 11). The Chief Engineer ordered him to fill the starboard gas oil side tank (Trial Exhibit 48, p. 13), to also watch the progress of bunkers being received in the two main side tanks through the tank tops on the main deck (10a), and to stop the bunkering when the level of oil in each side tank reached the second ladder rung from the top of the side tanks (Ex. Vol. 71). The Chief Engineer remained in his quarters (Trial Exhibit 48, p. 13). He failed to supervise Bafaloukos, an unlicensed man (7a, Ex. Vol. 21).

According to Bafaloukos, at the time he first went on watch, he saw that the level of oil in the side tanks was very low, at about ten ladder rungs from the top of each tank. The oil was *at the same level* in each side tank (Ex. Vol. 66, 67).

Thereafter, he proceeded to the engine room where he inspected various machinery and equipment, and opened the valve to the gas oil tank which had a capacity of 55.5 long tons (Ex. Vol. 68, 264, Trial Exhibit 45, p. 66).

According to Bafaloukos, he filled the gas oil tank by 0015 or 0020 hours, March 18, 1971 (Ex. Vol. 70) and closed the valve (Ex. Vol. 69). (If he failed or neglected to close

this valve, the gas oil tank would commence overflowing into the overflow double bottom tanks) (93a).

He then went topside and at 0030 hours, he called the acting Second Engineer, Andreas Spetsiotis, who was asleep in his quarters (Ex. Vol. 70). He returned to the deck and for approximately ten minutes watched the oil level rising regularly *at the same level* in both side tanks. When the oil level was barely touching the second ladder rung he called to the pumpman of the TRADER and told him to stop the pump (Ex. Vol. 72, 73). This occurred at about 0042 hours (8a). The pumpman acknowledged the order (Ex. Vol. 73, 74).

However, Bafaloukos did not wait to see that his order was carried out (10a) nor did he close the main intake valve at the bunkering manifold on deck (14a) which is a primary responsibility and duty of an officer in charge of bunkering a vessel (12a). Thereafter, Bafaloukos returned aft and closed the hatches to the tank tops of the port and starboard side tanks. He thereupon advised the Chief Engineer, who was in his quarters, that bunkering was completed (Ex. Vol. 74). Returning to the engine room, he inspected the boilers again (Ex. Vol. 75). At about 0050, some eight minutes after bunkering was completed, he went to the operating platform of the engine room where he observed an overflow of fuel oil through a sight glass indicator (Ex. Vol. 217). He ran up the engine room ladders encountering Spetsiotis, the acting Second Engineer, who was coming on watch to prepare the engine for departure. He told Spetsiotis that oil was overflowing from the tanks (Ex. Vol. 76, 77). Spetsiotis or Bafaloukos, at this point, could have closed the main intake valve on the third platform, but neither one did so (12a). Bafaloukos continued and ran on deck and, instead of immediately closing the main intake valve on deck (12a), shouted to the Master, who was on the boat deck of the midships house, to tell the pumpman on the barge to stop pumping (Ex. Vol. 77, 78). The pumpman

proceeded to the pump, and Bafaloukos *saw him slow down the pumping engine and close a valve* (Ex. Vol. 78, 217). Then, finally, Bafaloukos remembered to close his own main intake valve at the bunkering manifold on the main deck (Ex. Vol. 78).

In the meantime, Spetsiotis, in the engine room, continued on down to the main operating platform to see the overflow for himself (Ex. Vol. 144). He thereafter ran back up to the third platform to close the main intake valve. While he was on the third platform, the phone, located below on the main operating platform, rang. Spetsiotis went below to answer the phone. It was the Master calling from the bridge asking whether they were ready to sail. Spetsiotis answered that they were encountering some irregularity in bunkering but would be ready in fifteen minutes (Ex. Vol. 131, 132). (This conversation seems improbable because Bafaloukos testified that the Master was on deck ordering the pumpman of the *TRADER* to stop transfer operations) (Ex. Vol. 77, 78).

Bafaloukos returned to the engine room to find oil gushing up through the drains of the save oil catch basin beneath the central oil filters (Ex. Vol. 79, 80). It overflowed the basin and fell onto an operating diesel generator located directly below (Ex. Vol. 80). At about 0052 hours the oil became ignited and the fire and ensuing damage resulted (9a, 10a).

(Undocking pilot Captain Del Greco, a witness called on behalf of plaintiff, testified at an oral deposition concerning events which followed Bafaloukos's alleged second command to pumpman Milano to stop.

It is not known why the Court below made special mention of pilot Del Greco's deposition testimony, since this testimony could not possibly have supported plaintiff's contention that Milano continued pumping after 0042. Unless the Court below meant to infer that pumpman Milano

defied the orders of the *DARING* a second time, which would have been an act of lunacy on his part, and resumed pumping again after 0050 hours, the testimony of Del Greco on the issue of whether pumping continued after 0042 should be disregarded.

Del Greco came aboard *after* Bafaloukos and the Master of the *DARING* allegedly told Milano to stop a second time at 0050 (9a). Milano apparently carried out the order (9a). Bafaloukos even testified that he saw Milano *slow down the pumping engine and close a valve* (Ex. Vol. 78). What Del Greco heard and saw, then, was the *TRADER's* port engine running, which had been started to energize the hydraulic system needed to lower the boom supporting the cargo hose (313a, T.M. 407, Trial Exhibit 33A, photograph 15). Milano had turned off his starboard pumping engine when bunkering was completed (T.M. 406, 407).

Del Greco's testimony concerning the violent movement of the cargo hose also confirmed that there were no bunkers being pumped at that time (Ex. Vol. 323, 329). Captain Banks and Milano testified that when bunkers are delivered at the maximum rate, the cargo hose has a steady, firm appearance (324a, 325a; T.M. 410, 411). It does not swing around violently in the saddles. Common every day examples, i.e. garden hoses, service station gasoline hoses, fire hoses, all bear out the truth of this testimony. The pressure of the fluid within the hose makes it rigid and keeps it that way.

In addition, if pumping was still in progress when Del Greco saw the cargo hose, 10-15 seconds before the fire started, then there would have been no opportunity for Milano to blow the line clear of oil. Milano testified that there was no oil in the line when he broke the connection after the fire (T.M. 409); Trial Exhibit 1, Ex. Vol. 1, a photograph of the *TRADER's* 4 inch hose still attached to the *DARING* manifold shows the deck to be free and clean of any oil spill from the hose).

(ii) The version of what occurred as given by Pumpman T.C. Milano and Captain Herbert Banks of the Trader.

The TRADER's pumpman, T. C. Milano, remained on deck during the entire transfer operation. It was necessary to do so because the constantly changing drafts of the two vessels (the DARING ballasting, and the TRADER discharging) made it necessary for him to adjust the straps supporting the cargo hose on the boom to relieve the tension on the hose and also to adjust the lines holding the TRADER fast alongside the DARING (356a).

At about 0040, the last tank containing diesel oil was about pumped dry (T.M. 403, 404). Milano walked aft along the open deck to the house and from the deck called through an open doorway on the port side to Captain Banks, advising him that loading was about completed and that they had a clean delivery (T.M. 404, 405). Thereafter Milano walked back to the number three port tank and started closing his stripping valve (T.M. 406). He noticed someone had walked from aft on the DARING and stopped to speak to the Master who thereupon requested Milano to stop pumping. There was no excitement (T.M. 406). Milano advised him that he was already finished and complied by disengaging the clutch to the pump and shutting down the starboard engine (T.M. 406, 407).

(Bunkering a vessel requires extreme vigilance, both on the part of the personnel of the bunkering barge and the vessel receiving the oil. The one command that barge personnel wait for more than any other is the command to "stop pumping" (324a). To continue may result in the unwanted spill on the deck of the receiving vessel (325a).

Whenever a vessel does not want or cannot take full delivery, the TRADER keeps the cargo on board. This is termed a "shut out" (309a). It comes about from either a command to stop or when the receiving vessel closes its

intake valve against the TRADER's pumps, the latter action resulting in a relief valve opening and recirculating the cargo on board the TRADER (309a).

The proof at trial was that it is a common practice in the industry to return to the loading terminal with cargo that cannot be delivered. To suggest, as plaintiff did, that the TRADER would risk a spill and overdeliver its cargo rather than return home with a "shut out" is absurd) (307a-312a, 339a, 340a).

Milano testified he was told to stop only once, at about 0042, and never again thereafter (376a). (Plaintiff offered no evidence, why the pumping would have continued past 0042. There was no reason for Milano to have acknowledged Bafaloukos's signal to stop, wait till Bafaloukos walked away, and then continue pumping bunkers for another eight minutes until 0050. The proof at trial indicates that Milano could not continue because the Master of the DARING was standing on the boat deck directly over Milano during the bunkering operation) (375a, 377a, Ex. Vol. 214).

Thereafter Milano started up the port engine which would be used to hydraulically lower the boom supporting the cargo hose (T.M. 407). Meanwhile, Captain Banks made out his delivery receipt and came out on deck to help Milano put the vessel's ladder up against the side of the DARING (319a, Trial Exhibit 33B). At about 0050 Captain Banks climbed aboard the DARING (320a). He walked forward on the main deck to inspect his four inch hose, still joined to the flange at the manifold. No one was on the poorly lit deck (321a, 322a). He walked aft to present his delivery receipt to the Chief Engineer in his quarters (322a). As he was walking aft, he saw a large ball of flame come out of the skylight to the left side of the stack (323a). The time was about 0052 hours (322a). Captain Banks returned to the TRADER, advised the crew that the DARING was on fire and instructed them to start the main engines (T.M. 409). Pumpman Milano, after starting the main

engines, climbed aboard the DARING and disconnected the four inch hose from the six inch hose (T.M. 409). When the hoses were disconnected, Milano noticed there was no oil in the four inch hose which indicated that the hose was blown clear of oil at the completion of bunkering (T.M. 409). The TRADER then departed from the DARING and returned to her berth at Port Mobil.

POINT I

The District Court erred as a matter of law in concluding that the warranty contained in the indemnity provision of the marine fuel oil sales contract between Mobil Sales & Supply Corporation and Trade & Transport Inc., was directed at protection of environmental claims, not damage to the vessel itself.

The third-party action brought by Mobil Sales and Mobil against Transport is based on a provision contained in a marine fuel oil sales contract which was entered into between Mobil Sales and Transport on January 1, 1971, at the port of New York (Ex. Vol. 310; 6a). Oceanikos was the disclosed principal of Transport for purposes of this contract (13a). The indemnity provision in the marine fuel oil sales contract contained in paragraph (b) of Article 7, Deliveries (Ex. Vol. 312), provided *inter alia* that Transport:

“warrants that each vessel will be properly equipped, maintained, and operated so as to avoid leakage, spillage, overflow or water or land pollution and shall hold Seller and its supplier harmless and indemnify Seller and its supplier against any claim, action, suit, assessment, fine, levy, penalty or exaction of a like nature instituted by any person (including public authorities) resulting from any such alleged leakage, spillage, overflow or water or land pollution asserted or assessed against Seller or its supplier on the ground of damages alleged to have resulted from any

such alleged leakage, spillage, overflow, *or* water or land pollution, except insofar as it shall be established that such damage resulted *exclusively* from negligence of Seller or its supplier." (Emphasis added)

The conjunction "or" separating the words "leakage, spillage, overflow" from the words "water or land pollution" unmistakably contemplates two possible kinds of injury, i.e. injury to property, including the vessel, or environmental damage whether occurring on land or water.

The plain meaning of the warranty is that each vessel is to be maintained in such manner that any injury, including injury to the vessel through leaks, spills or overflows as well as injury to land or marine environment, will be avoided.

This provision clearly contemplates injury to the vessel, while refueling, resulting from leaks, spills or overflows because a fuel oil leak in a vessel's pipeline or fuel tank, or a fuel oil spill or overflow occurring on the deck of the vessel through a tank vent pipe always causes damage in addition to a dangerous condition aboard ship. A vessel sustaining a massive overflow of fuel on deck through a vent pipe during refueling will doubtless result in damage in the way of substantial cleanup costs. Clearly this is the type of claim Mobil Sales and Mobil needed protection from and would receive under the indemnity provision. A fuel oil spill on deck which ignites and causes fire with resulting damage to the vessel is, once again, the type of claim that Mobil Sales and Mobil needed protection from and one that was contemplated by the indemnity provision.

It is only reasonable to assume that vessel damage is embraced by the indemnity provision of this fuel oil sales contract, since fuel oil is a dangerous commodity, one that is liable to cause injury to a vessel.

Contractual provisions expressing a clear and unmistakable intent to indemnify a party against its own negligence

are enforceable under New York law. *Simon v. Corbetta Construction Co., Inc.*, 391 F.Supp. 708 (S.D.N.Y. 1975).

Courts have scrutinized contracts of indemnity for an expression of an intent to indemnify and for some indication of the scope of that indemnification. *Levine v. Shell Oil Company*, 28 N.Y.2d 205, 321 N.Y.S.2d 81, 269 N.E.2d 799 (1971).

This indemnity provision was intended by Transport to indemnify Mobil Sales and its supplier Mobil, and the scope of the indemnification is defined because it holds Mobil Sales and its supplier harmless "against *any claim, action, suit . . .* instituted by *any person . . .* resulting from any such alleged leakage, spillage, overflow or water or land pollution asserted or assessed . . . on the ground of *damages* alleged to have resulted. . . .".

That the indemnity provision is not ambiguous and contemplates vessel damage is also provided by the final words in said clause "except insofar as it shall be established that such *damage* resulted exclusively from negligence of Seller or its supplier."

The vessel can never be an exception to being damaged by a leak, spill or overflow because the vessel is, of necessity, the very first object that comes in contact with a leak or a spill or an overflow of fuel oil. Fuel oil tanks are located within the vessel's hull. Fuel oil pipelines are located either on the vessel's deck or below decks within the vessel's hull. Fuel tank vent lines terminate above and over the vessel's decks. Fuel lines or fuel tank vent lines never lead overboard to discharge directly into or onto the sea. Leaking, spilling or overflowing fuel oil must first contact the vessel.

The word "*damage*" must contemplate damage to the vessel because water or land damage does not always result following a leak, spill or overflow of fuel oil. Oil leaks, spills or overflows may be contained aboard the vessel and

never escape overboard. And, even if it escapes the vessel, oil, especially a light oil product, can evaporate or disperse by action of wind, waves, tides, current or precipitation, *without causing any damage.*

In the case at bar, the overflow of fuel oil through save oil pipelines spilled over *within* the vessel's engine room resulting in fire damage which was confined to and affecting only the vessel DARING. No land or water pollution resulted. The words "leakage, spillage, overflow" when used in connection with the conjunction "or" and with the warranty "that each vessel will be properly equipped, maintained, and operated" must cover damage to the vessel.

Although the language in this indemnity provision amply expresses an intent to indemnify, the New York courts have allowed indemnification where less specific language has been used.

In *Levine v. Shell Oil Company*, 28 N.Y.2d 205, 321 N.Y.S.2d 81, 269 N.E.2d 799 (1971), the New York Court of Appeals said:

"Indeed, more recently we have allowed indemnification where one party agreed to hold the other 'harmless against all claims and demands * * * of whatsoever kind or nature' (*Kurek v. Port Chester Housing Auth.*, 18 N.Y.2d 450, 456, 276 N.Y.S.2d 612, 615, 223 N.E.2d 25, 27). It was on the basis of our decision in *Kurek* that we sustained the liability of an indemnitor whose agreement simply provided for indemnification 'against any and all liability * * * including any and all expense, legal or otherwise' (*Liff v. Consolidated Edison Co.*, 29 A.D. 2d 665, 286 N.Y.S.2d 354, *affd.* 23 N.Y.2d 854, 298 N.Y.S.2d 66, 245 N.E.2d 800)." (p. 86)

In *Levine v. Shell*, *supra*, even though the contractual indemnity provision fell short of expressly stating that its coverage extended to the active negligence of the in-

demnitee, the court found that that must have been the intent of the parties. The court reasoned:

"Since the plain meaning of these words fairly includes the liability for the active negligence of Shell, we see no reason why more should be required to establish the unmistakable intent of the parties. A contrary construction would result in the conclusion that the clause was a nullity. Surely, this could not have been the intent of the parties (see *Corhill Corp. v. S.D. Plants, Inc.*, 9 N.Y.2d 595, 599, 217 N.Y.S.2d 1, 3, 176 N.E.2d 37, 38; *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46, 150 N.Y.S.2d 171, 174, 133 N.E.2d 688, 690)." (p. 86)

Similarly, although damage to the vessel was not expressly stated in the indemnity clause of the fuel oil contract, the unmistakable intent of the parties was to indemnify Mobil or its supplier for damage occasioned to the vessel, since in a refueling operation, the vessel itself, of necessity, must be the first instrumentality affected by a fuel oil leak, spill or overflow.

The holding in *Assets Realization Co. v. Roth*, 226 N.Y. 370, 123 N.E. 743 (1919), the authority relied upon by the District Court for Conclusion of Law No. 5, suggests a view opposite to that taken by the District Court. It suggests a view which supports Mobil Sales and Mobil. The New York Court of Appeals said:

"The defendant and his associates had a business interest to protect, and in order to protect it they assumed a primary liability as insurers against loss. The liability is not to be whittled down by the implication of conditions not fairly and reasonably involved in the *gist and scheme of the transaction*." (p. 375)

This language can fairly be interpreted to mean that Transport, in order to protect a business interest (i.e. a

local agent of foreign shipowners), undertook a liability as insurer against loss to Mobil Sales and its supplier, not only as to possible claims of third-parties, but loss or damage occasioned to vessels not properly equipped, maintained or operated where leaks, spills or overflows of fuel might occur during refueling operations. The liability of Transport is not to be "whittled down" unless there was something that was "not fairly and reasonably involved in the gist and scheme of the transaction".

Providing fuel to a vessel is within "the gist and scheme" of a marine fuel oil sales contract. The indemnity provision of this fuel oil sales contract which embraces "any claim . . . by any person . . . resulting from . . . any such alleged leakage, spillage, overflow" is, likewise, within "the gist and scheme of the transaction". In fact, it is an essential ingredient of the fuel oil sales contract.

It is submitted that the indemnity clause contemplates the possibility of damage to the vessel during fueling operations and that indemnification for such damage was the unmistakable intent of the parties when the contract was entered into.

Mobil Sales, a major supplier of marine fuel oil to vessels throughout the world *specifically* contracted to protect itself against the liability which has now been imposed upon it by the District Court. To have contracted otherwise would have left it or its supplier without protection against potential claims for vessel damage.

The liability of Transport as indemnitor is not to be "whittled down". The indemnity provision should be enforced against Transport.

POINT II

The District Court erred when it found as a fact that 26 $\frac{2}{3}$ tons of fuel oil pumped aboard the vessel Trade Daring from 0042 to 0050 hours was more than enough to fill the vessel's overflow double bottom tanks which had a capacity of only 23.2 tons of fuel leading it further to erroneously conclude that it was the port and starboard side tanks that had overflowed.

The District Court's finding that bunkering still continued after 0042 hours for eight additional minutes because the TRADER's pumpman did not execute Bafaloukos's command to stop, failed to take into account that before the 26 $\frac{2}{3}$ tons of fuel would start spilling over down into the overflow double bottom tanks, it had to fill the spaces which existed in the DARING's port and starboard fuel oil side tanks, starting from a point at the level of the second ladder rung up to a point at the level of the overflow pipes in those tanks (Ex. Vol. 368).

One can determine the exact quantity of oil existing between two given levels in the side tanks using the DARING's fuel oil calibration booklet (Ex. Vol. 5).

The level of the second ladder rung was at a point approximately 2.5 feet below the tank top in each side tank (Exhibit 3, Ex. Vol. 1). The overflow pipes were located 1'7 $\frac{1}{2}$ " from the tank top in the port side tank and 1'6" from the tank top in the starboard side tank (Ex. Vol. 5, 368; 157a-161a). It would have required a total of 5.35 tons of fuel oil to fill these spaces in the port and starboard fuel oil side tanks before any oil would have started spilling over into the overflow lines of those tanks and thence down into the overflow double bottom tanks which were empty (Ex. Vol. 112).

If the Court had considered that fact, and deducted the 5.35 tons from the 26 $\frac{2}{3}$ tons that were allegedly pumped in, it would have concluded that only 21.31 tons (26.66—

5.35 = 21.31) spilled into the overflow double bottom tanks leaving space for a reserve capacity of 1.89 tons. (For these computations see Point IV and Appendix C of Reply Brief of Mobil and Mobil Sales, which uses a reference point of only 2 feet below the tank top, a point more favorable to plaintiff. The result of 19.65 tons was arrived at in the Reply Brief because defendants assumed 25 tons overflowed, the figure used by plaintiff in its main Post Trial Brief; Ex. Vol. 388, 389, 395, 396).

The District Court's failure to deduct the amount of fuel required to fill the spaces of the fuel oil side tanks from the amount allegedly pumped aboard for those eight minutes caused it to erroneously conclude that the overflow double bottoms became pressed up and overflowed into the engine room because the main side tanks had overflowed. *cf. Bordas & Company v. Pizzaro Serrano*, 314 F.2d 291 (1 Cir. 1963); *White, Winning in Court on the Law of Facts*, 188 (1972).

There is no dispute that the overflow double bottom tanks became filled and pressed up into the save oil lines through the save oil basins of the central oil filters and spilled over onto a generator located below which ignited the oil. (Incidentally, the Court was also in error when it found that the oil overflowed from a catch basin of *a gas oil tank* (9a). There is no such testimony. The testimony of Bafaloukos and Spetsiotis, the only two eyewitnesses to the overflowing oil, was that oil overflowed the catch basin of the *central oil filters*) (Ex. Vol. 79, 80, 132).

The dispute is that the overflow double bottom tanks were not filled by oil spilling over from the side tanks but from the gas oil tank, the valve of which had been opened by Bafaloukos at about midnight (Ex. Vol. 68; Trial Exhibit 45, p. 66). This result was clearly possible if Bafaloukos had left the valve to the gas oil tank open.

"Therefore, if a crew member of the TRADE DARING carelessly left a valve open on the gas oil tank * * *,

you get the same filling up of the double bottoms and of overflow, would you not?

A. Sure." (Cross-examination of Argyriadis, 93a).

As to whether the gas oil valve was closed by him, Bafaloukos testified that he had done so only in answer to leading questions asked by counsel for Oceanikos which were objected to by Mobil's counsel (Ex. Vol. 69).

Further evidence that the side tanks had not overflowed was the fact that an onboard inspection of the *DARING* after the fire by surveyor Captain Henry C. Halboth disclosed that the levels of fuel oil in both the port and starboard side tanks were still situated *at the same levels* as Bafaloukos testified had been reached when he signaled pumpman Milano on the *TRADER* to stop pumping, i.e. at the second ladder rung, which was *below the overflow pipes* (177a-178a; Plaintiff's Exhibit 3, Ex. Vol. 1, 71, 72). The levels of fuel oil measured by Captain Halboth were made a part of his report (Ex. Vol. 263). The distance from the surface of the oil to the top of the tank (ullage) in the port side tank was 2 ft. 08 inches; in the starboard side tank the ullage measured was 2 ft. 06 inches (Ex. Vol. 263, 368). The levels of fuel oil were below the overflow lines which led down into the overflow double bottom tanks.

The District Court found that the levels of fuel oil were located below the overflow pipes because the fuel oil expanded during the fire and later contracted below the levels of the overflow pipes when it cooled after the fire (12a).

This finding is not supported by the evidence. Plaintiff's naval architect, Argyriadis, testified that it was his opinion that the temperature would have to rise approximately 50° in the port side tank and 40° in the starboard side tank (404a) in order to achieve an expansion and contraction which would have removed oil from the side tanks sufficient to come to rest at a point 1 foot below the overflow pipes.

On cross-examination, Argyriadis was unable to supply the Court with factual criteria for the basis of his determination (409a-415a). Argyriadis was a naval architect not a fire expert.

"Q. And what expertise do you have in that particular field? A. A few burned wrecks that I saw and the tables I have used and the *general feeling of the situation* after looking at the vessel." (415a)

That was the sum and substance of Argyriadis' basis for his determination of volumetric expansion of the fuel oil during the fire.

On behalf of Mobil, Captain Walter C. Maclean, Head of the Engineering Department at the United States Merchant Marine Academy (Ex. Vol. 336), during his re-cross-examination by counsel for Oceanikos, testified that several important factors militated against a temperature rise sufficient to have caused the diesel oil to expand enough to reach the overflow pipes: (a) the limited boundary between the engine room bulkhead and the side tanks, (b) the empty cargo tank spaces on the forward side of these tanks, (c) the oil in the tanks would be cooled by the cold water in the harbor and heat being absorbed through the tank boundary into the fuel oil might be negated by heat induction outward toward the water surrounding the vessel (175a-178a, Ex. Vol. 233, 365, 366). Captain Maclean testified that in order to obtain a reliable assessment of the volumetric change, you would have to have some reliable assessment as to the temperature change (176a). There was no data on which to base a reliable assessment as to the change in temperature, merely conjecture on the part of Argyriadis. In addition, the temperature of the fuel loaded aboard the *DARING* was only 45° (Ex. Vol. 15, 299a) and the temperature of the water in the harbor was only 40° (Ex. Vol. 365, 366).

The ullages obtained by Captain Halboth were almost equal in each tank (2'08" in the port tank and 2'06" in the starboard tank). It was virtually impossible for each tank to displace the same difference in height of oil due to heat expansion and contraction. The Capacity Plan (Trial Exhibit 12) and Fuel Oil Piping Diagram (Trial Exhibit 54) show that these tanks were not of the same capacity (starboard side tank—218.9 tons vs. port side tank 174.2 tons),

they were not of the same configuration (Ex. Vol. 268, Trial Exhibit 12), they did not have the same surface areas of exposure to the fire on the inside of the engine room. In order for plaintiff's theory to be valid, the tanks should be of equal size and have equal exposure areas to the fire.

In addition, the chances of the levels of fuel oil coming to rest, after expanding and contracting by virtue of the fire, to the *same exact point* where Bafaloukos testified the levels were at 0042, i.e. the second ladder rung, would also be virtually impossible.

There was no overflow of oil from the side tanks. The overflow was caused by Bafaloukos in failing to close the valve to the starboard gas oil tank (93a).

If he forgot to close the main intake valve on deck when bunkering was completed, and, if he forgot to close the main intake valve in the upper engine room, is it unreasonable to assume that he also forgot to close the valve to the gas oil tank?

POINT III

The District Court erred when it concluded that the design, construction and condition of the fuel oil overflow and save oil systems of the Daring were in full compliance with classification society requirements.

All vessel classification societies have regulations providing that fuel oil or gases shall not discharge or vent into engine room or boiler spaces. Fuel oil or gases are to be vented onto an open deck (Ex. Vol. 269-290).

Valves, in the DARING's save oil pipelines as originally designed, when closed, provided against such discharge (Trial Exhibit 54).

The District Court found as a fact that at the time of the casualty there were valves located on the save oil pipelines and that it was "fairly obvious that such valves were

not closed; otherwise the spill could not have occurred" (11a). In Conclusion of Law No. 2(a) it found that Oceanikos was at fault for failing to close the valve in the save oil pipeline system (13a).

The Court said that there was "some testimony" that there were no valves observed on the save oil pipelines, but it wasn't enough to convince the Court (11a). This "some testimony" alluded to by the Court consisted of the deposition testimony, taken at Washington, D.C., of Commander Peter J. Cronk, U.S. Coast Guard, Investigating Officer for the fire on board the DARING, the testimony of Captain Henry C. Halboth, a surveyor engaged by Mobil, the testimony of Captain Philip Neal, the Marine Safety Adviser for Mobil, and the testimony of Andreas Spetsiotis, acting Second Engineer of the DARING (149a).

The deposition testimony of Commander Cronk (Ex. Vol. 235-246) should have been accorded greater weight by the Court, since he was a completely impartial witness. He testified:

"Q. In the course of your inspection of this vessel did you trace that line from the oil drains directly to the bottom overflow tank?"

A. Yes, I did.

Q. Were there any, did you notice any valves in that line?

A. No. I did not see any valves in the line.

Q. Did a line go through any small tank before entering the double bottoms?

A. No, it did not.

Q. Did the line go through any system of a valve chest before it entered the double bottom?

A. No, it did not.

Q. What was the purpose of that line?

A. The purpose was to keep the drain basins from accumulating oil, it provided a means for getting rid of the oil that may have been caught by the drain basins, and delivering it to an overflow tank.

Q. The double bottoms—

A. This particular tank in the double bottom." (Ex. Vol. 242)

"Q. If you had noticed *any valves*, would you have indicated them on the drawing which is before you?

A. Yes, I would have.

Q. Had you noticed any small tank through which the line leaked before it entered the double bottoms, would you have noted it on your diagram?

A. Yes.

Q. With that type of a system, what would happen if the double bottom tanks were filled to capacity or actually in excess of capacity?

* * *

A. If the double bottom tank to which this drain line filled up, and continued to fill up, *oil would back up through the same line* and if it—oil kept going into the double bottom tank, overflowing, it would continue to back up until it entered the drain basin.

Q. Then what would happen?

A. If this process continued the *drain basins would overflow.*" (Ex. Vol. 243) (Emphasis added)

Commander, in your seven years experience as a marine inspector with the United States Coast Guard, have you ever been aboard a ship which had a drain system such as the *TRADE DARING*?

A. To the best I recall, I have not.

Q. It is unique in your experience, is that correct?

A. In my experience?

Q. Yes.

A. *This arrangement is unique.*" (Trial Exhibit 58, p. 56) (Emphasis added)

When questioned further about the leak tank or valve shown on the diagram (Ex. Vol. 230) drawn by plaintiff's expert, Argyriadis, Commander Cronk testified that he saw no such arrangement in the drain line which he examined (Ex. Vol. 246-247). He was the first witness who

testified that he saw no leak tank nor valves in the save oil pipelines.

Commander Cronk was the officer who was assigned the task of determining the cause of the fire. After conducting his investigation, he issued his formal report concluding that there was "*no substantive evidence of negligence, misconduct, incompetence or violation of federal law*" on the part of the crew of the TRADER (Ex. Vol. 231, par. 4).

Next, Captain Halboth testified that he discovered no valves in the save oil pipelines beneath the save oil basins to the central oil filters (198a) nor in the save oil lines to the port light oil day tank or settling tanks (195a, 198a, Ex. Vol. 263, 4th par.). He found, instead, that the save oil pipelines led either directly to the overflow double bottom tanks or to connections made with vent pipelines of the overflow double bottom tanks (197a, Ex. Vol. 259). He discovered no leak tank or pipelines leading to a leak tank, nor a manifold chest leading from the leak tank (197a, 218a). Captain Halboth's report of survey corroborated the testimony of Commander Cronk, i.e. that should the doublebottom tanks overflow, oil would back-flow into the save oil system and thence into the engine room (Ex. Vol. 266, pars. a & d). Captain Halboth made a sketch immediately following his inspection of the DARING (205a, 206a) of the save oil system (Ex. Vol. 259) which supported his testimony and report (194a-198a). The only hand closure valves Captain Halboth discovered were beneath the basins to the port and starboard diesel oil day tanks (198a).

Captain Phillip Neal, of Mobil, also found that the save oil drain lines connected up with the vent lines leading from the overflow tanks (251a).

The Court below may have refused to consider the testimony of Captains Halboth and Neal because they were Mobil's witnesses, if that were the only testimony offered.

The question is how could it refuse to consider their testimony when it was buttressed not only by the testimony of an impartial witness, i.e. Commander Cronk, but by the testimony of Spetsiotis, the DARING's acting Second Engineer, who also testified that pipelines led from the catch basins directly into the overflow double bottom tanks, and that valves did not exist in these lines.

Spetsiotis testified in connection with Plaintiff's Exhibit 11 (Ex. Vol. 2):

"A. And I know that this basin has three scuppers because I have followed the entire line and know *that it winds up* in the double bottom of that tank. *It connects to the double bottom directly on top of it* screwed on.

Q. *Are there any valves in the scupper lines?* A. *No, there are none.*" (Ex. Vol. 158)

Q. Do the three scuppers which you have just testified to also lead to the double bottom?

A. They are the ones that go, yes.

Q. *Are there any valves on those scupper lines?*

A. No.

Q. Therefore, is it not a fact that if your side tank overflows *and accumulates in the double bottom so that the double bottom is full, the oil goes up your scupper lines?*

A. *That's right.*

Q. *And into the basins?*

A. *That's right.*" (Ex. Vol. 159) (Emphasis added)

And on redirect examination by counsel for Oceanikos Spetsiotis testified:

"Q. How many scuppers did you see the oil bubbling from?

A. From three.

Q. Where do those scuppers lead to?

A. *To the double bottom overflow tanks.* (Ex. Vol. 163) (Ex. Vol. 2) (Emphasis added)

Even though all of this "some testimony" completely contradicted the testimony offered by plaintiff's expert witness, Argyriadis, that valves existed in the save oil lines beneath the central oil filters (96a), the Court accepted his testimony.

The Court below was in error when it found that valves existed in the save oil lines for two reasons: (a) it was against the weight of credible evidence and (b) it relied upon the testimony of Argyriadis who also testified that the normal functioning of the save oil system required that *all valves beneath collection basins should be left open.*

"Q. And those valves would have to be open before you could get the—

A. *They would be normally. Otherwise any dripping out of the filter or the day tank would not go into your leakage tank.* (74a) (See also 75a)

The Court below found that the spill took place because the valves were left *open*. It further found that if the valves were closed "the fuel [from the overflow double bottom tanks] would have leaked through the vent lines which opened to the decks of the vessel." This is obviously the normal way any fuel oil overflow and spill would have taken place (325a).

The District Court was inconsistent. Despite the overwhelming evidence to the contrary, it accepted Argyriadis's testimony that valves existed in the save oil pipe lines (96a). At the same time, it correctly refused to believe Argyriadis's testimony that the save oil system was designed to operate with the valves open (11a).

The weight of the credible testimony of Cdr. Cronk, Captain Halboth, Captain Neal, and acting Second Engineer Spetsiotis proved that Argyriadis was wrong when he

said there was a leak tank system to collect drippings; that there were valves in the save oil lines from the central oil filters and port light oil day tanks which were normally left in the *open* position; and that the save oil lines led into the leak tank, rather than go directly or through connections with vent pipes into the overflow tanks.

The proof at trial demonstrated that the save oil system, as it had been originally designed, was altered prior to the date of the casualty. The system in use was a radical departure from the original design, and violated standards of safety in the marine engineering industry and the rules of the vessel's classification societies, dealing with venting, fuel oil and drain lines systems. cf. *In re Marine Sulphur Queen*, 312 F.Supp. 1081, 1094, 1095 (S.D.N.Y. 1970), *aff'd* in part, *rev. in part*, 460 F.2d 89, 98 (2 Cir. 1972), *cert. den.* 93 S.Ct. 318, 409 U.S. 982, 34 L.Ed. 2d 246. This violation by plaintiff Oceanikos was a contributing cause of the fire and resulting damage.

The deposition testimony of Commander Peter J. Cronk, Andreas Spetsiotis, and Theodoros Bafaloukos should be considered by this Court *de novo*.

POINT IV

Since the District Court erred in finding that fuel oil overflow and save oil systems of the *Daring* were in compliance with classification society standards, it failed to conclude that this intervening violation of classification society construction rules and standards of safe marine engineering practices was not reasonably foreseeable by defendants and constituted a proximate intervening cause between any alleged negligence of defendants and the casualty.

It is submitted that an oil spill on deck through the vent pipes with possible damage to the vessel or possible pollution of the harbor is the only reasonably foreseeable result from an overdelivery of bunkers (325a).

In this case, the plaintiff's violation of classification society construction rules and standards of safe marine engineering practices with respect to the save oil system arrangement aboard the DARING, was not reasonably foreseeable by the defendants and constituted a proximate intervening cause between any alleged negligence of defendants and the casualty.

Permeating negligence law is the principle that the damage actually suffered must, to be recoverable, have been reasonably foreseeable as resulting from the particular risk that defendant's act or omission created.

"Issues of negligence call for the exercise of common sense and sound judgment under the circumstances of particular cases. *Schultz v. Pennsylvania Railroad Co.*, 350 U.S. 523, 76 S. Ct. 608, 100 L. Ed. 668. Failure to guard against a remote possibility of accident, or one which could not in the exercise of ordinary care be foreseen, does not constitute negligence. * * *"
(*In Re Reading's Petition*, 169 F. Supp. 165, 167-8 (N.D.N.Y. 1958), aff'd 271 F.2d 959 (2 Cir. 1959))

Hindsight is that vision which wins many a Sunday football game after it has been played, but in a judicial contest it is foresight which sets the standard, and foresight is to be judged from the facts as they existed at the time of the alleged negligent act. *Carufel v. Chesapeake and Ohio Railway Company*, 286 F.2d 193 (1961) [6th Cir.] approved the aforementioned statement when the Court quoted 1 *Shearman and Redfield on Negligence* (Rev. Ed.) 50, Section 24.

"Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or

should, in the exercise of reasonable care, have anticipated. Reasonable anticipation is that expectation created in the mind of the ordinarily prudent and competent person as the consequence of his reaction to any given set of circumstances. If such expectation carries recognition that the given set of circumstances is suggestive of danger, then failure to take appropriate safety measures constitutes negligence. On the contrary, there is no duty to guard when there is no danger reasonably to be apprehended. Negligence is gauged by the ability to anticipate. Precaution is a duty only so far as there is reason for apprehension. Reasonable apprehension does not include anticipation of every conceivable injury. There is no duty to guard against remote and doubtful dangers." (pp. 195-196)

POINT V

The Court erred when it found that it was chronologically impossible to have completed the bunkering operation at 0042 hours.

The District Court correctly said ". . . I cannot find with any certainty given the exigent circumstances that the witnesses on either side of this controversy could state with certainty the exact times when they did certain things" (11a, 12a).

Indeed, the times given by the various witnesses and the times recorded in various documents were all imprecise (Ex. Vol. 378). Yet in concluding that the bunkering operation could not have been completed at about 0042 hours, the Court does use "exact times".

The District Court applies 2310 hours as the time of the commencement of discharging the 349 tons of bunkers in Nos. 3 port and starboard tanks at a maximum rate of 1500 rpms or 3.3 tons per minute. It arrived at 2310

by using the Mobil pumpman's testimony that it took about 20-25 minutes to complete pumping No. 1 port tank. However, No. 1 port tank only held 25 tons (actually 24.74 tons) of cargo. If No. 1 port tank only held 25 tons of oil, it could not have taken 25 minutes to pump out 25 tons, i.e. one ton per minute. It is submitted that pumping of No. 1 port tank only took 9 minutes, not 20 to 25 minutes. Pumping started at about 2250 hours, and proceeded at a rate of 1000 rpms for 5 minutes. This meant that 11 tons of cargo were discharged in that 5 minute period of time. (If 1500 rpms delivered approximately 3.3 tons per minute, then 1000 rpms delivered $1000/1500 \times 3.3 = 2.2$ tons \times 5 minutes = 11 tons). This left 13.74 tons remaining in that tank to be discharged ($24.74 - 11 = 13.74$). At 2255, the speed of the pump was increased to a maximum speed of 1500 rpms or approximately 3.3 tons per minute. The remaining 13.74 tons were therefore discharged in about 4 minutes, or at 2259 hours ($13.74 \div 3.3 = 4.16$).

It was chronologically possible for the bunkering to have been completed by 0042 hours merely by pumping at a rate of $3\frac{3}{5}$ tons per minute rather than at a rate of $3\frac{1}{3}$ tons per minute. Only .3 ton per minute additional would have been required (Ex. Vol. 394).

POINT VI

If, as the Court found, both plaintiff and defendants were at fault for the casualty, then the Court did not err in apportioning liability at 75% Oceanikos and 25% for Mobil, Mobil Sales & Trader.

The District Court found: "It is clear that the third engineer on board the DARING had the ultimate control of this bunkering operation." (12a)

Yet, this acting Third engineer was unlicensed (as indeed were all of the DARING's engineers with the exception of the Chief Engineer) (7a).

The District Court specifically found Oceanikos at fault for improperly manning its vessel (13a, 16a).

The plaintiff offered no proof whatever to show that failure to properly man the vessel could not have caused the casualty. The evidence presented proved just the contrary, i.e. that Bafaloukos's lack of qualifications and training was the principal reason for the cause of the casualty, in that:

- a) he failed to ensure that the alleged valves in the save oil drain line were closed (13a);
- b) he failed to see if the order to stop bunkering had been executed by the TRADER's pumpman (14a);
- c) he failed to turn off the main intake valve on deck, at the bunkering manifold, as soon as the order to stop bunkering was given to the Mobil pumpman, which was his principal responsibility as the DARING's officer in charge of bunkering (12a, 14a, T.M. 180, 181);
- d) he failed to be at his post in the engine room for eight crucial minutes following the order to stop bunkering, during which time an overflow was allegedly taking place (10a);
- e) he failed to close the main valve in the engine room after the overflow became evident (14a).

Had Bafaloukos closed the main intake valve on deck when he gave the order to stop bunkering to the Mobil pumpman, no spill would ever have taken place. Also, after Bafaloukos spotted the overflow in the engine room, had he been properly trained, he would have immediately shut off the main intake valve in the engine room. The evidence is that after he spotted the overflow he ran past the main

intake valve in the engine room; and further, acting Second Engineer Spetsiotis, who encountered Bafaloukos running out of the engine room, even after being advised of the overflow by Bafaloukos, instead of taking immediate and positive action to close the main intake valve, went from the uppermost platform down to the lowermost platform, then went forward to view the overflow in the sight glass, and then went back up to the uppermost platform before closing the main intake valve (Ex. Vol. 76, 77, 127-129). Trained, qualified ship's engineers would have acted differently. In this connection, see *Cerro Sales Corp. v. Atlantic Marine Enterprises, Inc.*, 403 F.Supp. 562, 567 (S.D.N.Y. 1975). In light of the above circumstances, the District Court, if anything, was generous to the plaintiff in apportioning liability in the amounts it did.

The authorities relied upon by plaintiff in Point II of its principal brief are cases involving breach of implied warranty in maritime service contracts. The case at bar, however, is founded upon *negligence and breach of contract*. (See the Complaint, pars. 7 and 8).

If the defendants were negligent, then the case of *Houston-New Orleans, Inc. v. Page Engineering Co.*, 353 F.Supp. 890 (E.D. La. 1972) was properly relied upon by the District Court in Conclusion of Law No. 4 because that case was similarly tried on negligence and on breach of warranty under maritime contract causes of action. A division of damages based upon the comparative fault of both parties was therefore proper. In *Houston-New Orleans*, *supra* the Court held:

"This appears to be a classic situation for the application of the doctrine of comparative negligence. The fault of each party was a cause in fact, or as it is sometimes called a 'but for' cause or *causa sine qua non*, of the damage."

* * * * *

"In admiralty the sensible doctrine applies that where all share in fault for the loss, all should share in bearing the economic burden. HNO's negligence merely mitigates damages; it does not bar the claim. *Pope & Tablot, Inc. v. Hawn*, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143." (p. 900)

See *Jig The Third Corp. v. Puritan Mar. Ins. Under. Corp.*, 519 F.2d 171, 175 (5 Cir. 1975) citing with approval *Houston-New Orleans*, *supra*. See also *Southern Railway Company v. Brunswick Pulp & Paper Co.*, 376 F.Supp. 96 (S.D. Ga. 1974), where a railroad sought to recover damages from a pulp manufacturer for all or part of a settlement made by the railroad with an injured employee. The Court, in that action, which was predicated solely on a breach of *contractual indemnity*, gave recognition to the admiralty doctrine of proportional fault stated in *Houston-New Orleans, Inc. v. Page Engineering Co.*, 353 F.Supp. 890 (E.D. La. 1972), and applied *comparative negligence* concepts to determine the relative fault of the parties.

See *United States v. Reliable Transfer Company, Inc.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed. 2d 251 (1975), where the Supreme Court swept away the rule of equal division of damages in collision and stranding cases, in effect since 1854, and applied a standard that allocates liability for damages according to comparative fault.

"* * * in our own admiralty law a rule of comparative negligence has long been applied with no untoward difficulties in personal injury actions. See, e.g., *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409. * * *" (p. 407)

* * *

"* * * And worldwide experience has taught that that goal [a just and equitable allocation of damages] can be more nearly realized by a standard that allocates liability for damages according to comparative fault whenever possible." (p. 411)

In *Reliable, supra*, at pp. 401-402, n. 3, the Court cites *Staring, Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Calif. L.Rev. 304 (1957). The pertinent sections of the Staring article read:

"Despite the inclination of courts to discuss contribution as though it were only a tort matter, it may be more desirable to say that it arises from a breach of duty. The somewhat artificial dichotomy which exists in the common law between torts and contracts has not traditionally been observed in admiralty. The admiralty courts are civil law courts and the civil law in general has never experienced the agonies of the common law writ system and has never observed a sharp distinction between contractual and delictual rights. Accordingly, in numerous instances already cited, contribution or division has been allowed in cases of breach of contract. While contribution for breach of contract raises certain problems, the flexibility of admiralty on this point, as on others where it contrasts with common law rigidity, should be recognized and perpetuated as a means of doing substantial justice." (p. 334)

"CONCLUSION

* * *

2. The basic principle of contribution in admiralty is that where damages arise from the fault of two or more persons—including vessels as persons where liable in rem—such persons shall share responsibility for the damages.

* * *

7. Contribution applies to *contractual claims based upon negligence*, and despite contractual relations between contributors, unless the particular contract contemplates that the entire risk in the particular case be borne by one of the contracting parties.

* * *

15. Contribution is of the substance of the maritime law and must be applied in every court." (pp. 344, 345) (emphasis added)

Since the plaintiff's action is predicated on both negligence and breach of contract, and if the Court is correct in finding negligence on the part of both parties, then the Court's determination of liability based on the fault attributable to each party should stand at 75% Oceanikos and 25% Mobil, Mobil Sales & Trader. *Houston-New Orleans Inc. v. Page Engineering*, 353 F.Supp. 890 (E.D. La. 1972).

Conclusion

That portion of the decision which holds Mobil, Mobil Sales and the TRADER jointly and severally 25% at fault should be reversed. Judgment should be rendered holding Oceanikos solely at fault and dismissing the complaint with costs.

In the alternative, should this Court affirm that portion of the decision which holds Mobil, Mobil Sales and the TRADER at fault, then the decision should be modified to provide that Mobil, Mobil Sales and the TRADER are entitled to indemnification from Transport.

Respectfully submitted,

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